

**Fair Political Practices Commission**  
**MEMORANDUM**

To: Chairman Randolph and Commissioners Blair, Downey, Huguenin and Remy

From: Andreas C. Rockas, Counsel, Legal Division  
John Wallace, Assistant General Counsel  
Luisa Menchaca, General Counsel

Date: October 21, 2005

Subject: Pre-notice Discussion of Proposed Regulation 18361.10 – Designation Of Certain Adjudicated Decisions As Precedent

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**I. EXECUTIVE SUMMARY**

The Commission prosecutes many violations of the Political Reform Act (“Act”)<sup>1</sup> through administrative hearings, i.e., “mini-trials.” Nearly all such administrative hearings are delegated by the Commission to be carried out by administrative law judges (“ALJ’s”) outside the agency at the Office of Administrative Hearings. These ALJ’s typically preside over hearings involving a wide variety of substantive law that does not involve the provisions of the Act. The Enforcement Division reports that at times an ALJ’s unfamiliarity with the Act leads to inconsistent results and, therefore, a lack of predictability regarding how the Act will be applied in any particular case. The Legal Division, therefore, formulated this regulatory proposal for consideration by the Commission. To develop a better understanding of the issues, Commission staff held an interested persons’ meeting on the subject on August 10, 2005. Based on public comments and staff input, staff proposes consideration of regulation 18361.10 for pre-notice discussion.

The proposed regulation would set out guidelines and procedures through which the Commission might increase the consistency, predictability and uniformity of its adjudicated decisions by facilitating the creation of a body of “case law.” Specifically, in accordance with the provisions of section 11425.60 and related statutes in the Administrative Procedure Act (“APA”)<sup>2</sup>, the proposal would provide the Commission with a framework through which it could deem all or parts of certain administrative enforcement decisions as having precedential value. Such precedent could be cited as binding authority in arguments made to ALJ’s, and as persuasive authority to both state

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<sup>1</sup> Government Code §§ 81000 – 91014. Commission regulations appear at Title 2, §§ 18109 – 18997 of the California Code of Regulations. All further references to statutory “sections” will be to the Government Code, and all further references to “regulations” will be to title 2 of the California Code of Regulations, unless otherwise indicated.

<sup>2</sup> Government Code §§ 11340 – 11529; see § 11370 [defining what shall be cited as the “Administrative Procedure Act”].)

and federal judges, interpreting the statutes and regulations comprising the Act in future proceedings.

Staff recommends approval for noticing the proposed regulation for adoption at its January 2006 meeting.

## **II. BACKGROUND**

### **A. Brief Overview Of The Commission's Administrative Enforcement Procedures**

When the Commission determines that there is probable cause that the Act has been violated, it may hold an administrative hearing to determine if a violation has occurred. (Section 83116.) Such hearings – the conduct of which is almost always delegated to ALJ's at the Office of Administrative Hearings – are conducted in accordance with Chapter 5 of the APA.<sup>3</sup> Once a proposed decision is rendered by an ALJ, the Commission may either adopt it, reduce the proposed penalty, make a clarifying change to it, or reject the proposed decision altogether and try the case itself. (Section 11517(c); see sections 83116, 83116.3, 83116.5 and regs. 18361.5 & 18361.9.) The maximum penalty the Commission can levy through administrative procedure is \$5,000 per violation. (Section 83116(c).)

Enforcement proceedings by themselves do not result in policy statements or interpretations by the Commission that have precedential value. Currently, and since its inception, the Commission has directly voted upon statements of policy and interpretation regarding the Act through two basic methods: rulemaking and the issuance of opinions. (See sections 83112 and 83114(a), respectively, and regs. 18312 & 18320 et seq.) However, since at least 1997, the Commission has possessed but never exercised its power to speak through a third method – by designating certain of its adjudicated decisions as precedent. (See section 11425.60 [operative July 1, 1997].)

It is believed that through the creation of a body of “case law,” as contemplated by section 11425.60, the Commission would be able to formalize and record its interpretation of parts of the Act that are awkwardly and/or rarely dealt with through regulations (which lack factual context) or the issuance of opinions (which deal only with prospective behavior). An ever-growing body of case law over time could thus increase the predictability of anticipated results and potentially lead to more pre-hearing settlements and thus, efficient use of resources. Of course, the care required to create and maintain a new, direct and consistent source of interpretive statements by the Commission would consume additional time and resources.

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<sup>3</sup> Government Code §§ 11500 – 11529 [Chapter 5 is entitled “Administrative Adjudication: Formal Hearing”].

## **B. The Power Of California Agencies To Make Precedent Under The Administrative Procedures Act**

Since July 1, 1997, state agencies (including the Commission) which adjudicate matters pursuant to the APA have been authorized to designate certain decisions resulting from adjudicative proceedings as having the value of precedent. (Sections 11425.10(a)(7) & 11425.60.)<sup>4</sup> Section 11425.60 specifically speaks to the power of agencies to deem certain adjudicative decisions as precedent. It states:

“(a) A decision may not be expressly relied on as precedent unless it is designated as a precedent decision by the agency.

“(b) An agency may designate as a precedent decision a decision or part of a decision that contains a significant legal or policy determination of general application that is likely to recur. Designation of a decision or part of a decision as a precedent decision is not rulemaking and need not be done under Chapter 3.5 (commencing with Section 11340). An agency’s designation of a decision or part of a decision, or failure to designate a decision or part of a decision, as a precedent decision is not subject to judicial review.

“(c) An agency shall maintain an index of significant legal and policy determinations made in precedent decisions. The index shall be updated not less frequently than annually, unless no precedent decision has been designated since the last preceding update. The index shall be made available to the public by subscription, and its availability shall be publicized annually in the California Regulatory Notice Register.

“(d) This section applies to decisions issued on or after July 1, 1997. Nothing in this section precludes an agency from designating and indexing as a precedent decision a decision issued before July 1, 1997.” (Section 11425.60.)

The term “decision” is initially defined in Chapter 4.5 of the APA quite broadly – as “an agency action of specific application that determines a legal right, duty, privilege, immunity, or other legal interest of a particular person.” (Section 11405.50(a).) But its use in section 11425.60 (and all other parts of Chapter 4.5) is narrowed in light of the following section: “This chapter applies to a decision by an agency if, under the federal or state Constitution or a federal or state statute, an evidentiary hearing for determination

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<sup>4</sup> These two sections are found in Chapter 4.5 of the APA, which is entitled “Administrative Adjudication: General Provisions”; see also sections 11405.30 & 11410.20, defining “agency” for purposes of Chapter 4.5. It should also be noted that though §§ 11425.10 & 11425.60 are post-1974 amendments to the APA, the Commission is obliged to use them as bases for designating certain decisions as precedent since those sections do not involve the Commission’s rulemaking authority. (See *FPPC v. Off. of Admin. Law, et al.* (April 27, 1992, C010924) [nonpub. opn.] )

of facts is required for formulation and issuance of the decision.” (Section 11410.10.) Throughout this memorandum, the term decision, therefore, refers to one borne of an evidentiary hearing, i.e., an “adjudicated” decision.

Further guidance as to the restrictions placed upon the Commission in designating precedent is found in the Law Revision Commission’s 1995 comments regarding section 11425.60. Those self-explanatory comments state:

“Section 11425.60 limits the authority of an agency to rely on previous decisions unless the decisions have been publicly announced as precedential.

“The first sentence of subdivision (b) recognizes the need of agencies to be able to make law and policy through adjudication as well as through rulemaking. It codifies the practice of a number of agencies to designate important decisions as precedential. See Sections 12935(h) (Fair Employment and Housing Commission), 19582.5 (State Personnel Board); Unemp. Ins. Code § 409 (Unemployment Insurance Appeals Board). Section 11425.60 is intended to encourage agencies to articulate what they are doing when they make new law or policy in an adjudicative decision. An agency may not by precedent decision revise or amend an existing regulation or adopt a rule that has no adequate legislative basis.

“Under the second sentence of subdivision (b), this section applies notwithstanding Section 11340.5 (“underground regulations”). See 1993 OAL Det. No. 1 (determination by Office of Administrative Law that agency designation of decision as precedential violates former Government Code Section 11347.5 [now 11340.5] unless made pursuant to rulemaking procedures). The provision is drawn from Government Code Section 19582.5 (expressly exempting the State Personnel Board's precedent decision designations from rulemaking procedures). See also Unemp. Ins. Code § 409 (Unemployment Insurance Appeals Board). Nonetheless, agencies are encouraged to express precedent decisions in the form of regulations, to the extent practicable.

“The index required by subdivision (c) is a public record, available for public inspection and copying. [¶] Subdivision (d) minimizes the potential burden on agencies by making the precedent decision requirements prospective only.” (Cal. Law Revision Com. comments to section 11425.60, Deering’s Ann. Gov. Code Ann. (2005 ed.).)

Many agencies have adopted regulations regarding the designation (or non-designation) of their decisions as precedent.<sup>5</sup>

### **C. Benefits Of Adopting Regulation**

The Enforcement Division believes that a regulation facilitating the designation of certain administratively adjudicated enforcement decisions as having precedential value would benefit interpretation and enforcement of the Act. For example, in adjudicating any enforcement matter, ALJ's are required to consider the following factors set out in regulation 18361.5:

“(d) Factors to be Considered by the Commission. In framing a proposed order following a finding of a violation pursuant to Government Code section 83116, the Commission and the administrative law judge shall consider all the surrounding circumstances including but not limited to:

“(1) The seriousness of the violation;

“(2) The presence or absence of any intention to conceal, deceive or mislead;

“(3) Whether the violation was deliberate, negligent or inadvertent;

“(4) Whether the violator demonstrated good faith by consulting the Commission staff or any other government agency in a manner not constituting a complete defense under Government Code section 83114(b);

“(5) Whether the violation was isolated or part of a pattern and whether the violator has a prior record of violations of the Political Reform Act or similar laws; and

“(6) Whether the violator, upon learning of a reporting violation, voluntarily filed amendments to provide full disclosure.”  
(Reg. 18361.5(d).)

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<sup>5</sup> State Bd. of Control (Cal. Code Regs., tit. 2, § 619.7), Fair Employment & Housing Comm. (Cal. Code Regs., tit. 2, § 7435), Cal. Dept. of Education (Cal. Code Regs., tit. 5, § 3085), Dept. of Industrial Relations – Workers' Comp. Appeals Board (Cal. Code Regs., tit. 8, § 10341), Agricultural Labor Relations Bd. (Cal. Code Regs., tit. 8, § 20287), Pub. Employment Relations Bd. (Cal. Code Regs., tit. 8, §§ 32215, 32320), Ins. Commissioner (Cal. Code Regs., tit. 10, §§ 2656.1, 2656.3), Comm. On Corr. Peace Officer Standards & Training (Cal. Code Regs., tit. 15, § 6062(f)), Med. Bd. Of Calif. (Cal. Code Regs., tit. 16, § 1364.40), State Fire Marshal (Cal. Code Regs., tit. 19, § 2.02), Pub. Utilities Comm. (Cal. Code Regs., tit. 20, §§ 13.2(i), 51.8, 86.3), Calif. Unemployment Ins. Appeals Bd. (Cal. Code Regs., tit. 22, §§ 5108, 5109), and Dept. of Housing & Community Dev. Programs (Cal. Code Regs., tit. 25, § 6168).

However, it has been argued that the application of such broad factors by different ALJ's who deal infrequently with the Act, has yielded a wide variety of results. It is not an unreasonable position that such factors only gain meaning, and will only create some semblance of consistency, when discussed in the specific factual contexts provided by case law.

The designation of precedent could also be applied in substantial areas of the Act to gain a measure of certainty and consistency that is not easily dealt with through regulation or the issuance of opinions. For example, regulation 18225.7, defines the phrase "made at the behest of" to establish when a coordinated payment is made which may result in a contribution to a candidate. Subdivision (a) of the regulation defines that phrase to mean: "made under the control or at the direction of, in cooperation, consultation, coordination, or concert with, at the request or suggestion of, or with the express, prior consent of." A precedential decision, with the benefit of the factual context it provides, could help establish when particular conduct might constitute coordinated payments. This would be particularly useful to the Commission and the regulated community to determine what specific conduct fits under the regulation in future elections, for example.

### **III. PROPOSED REGULATORY ACTION**

The following is the proposed language and discussion of decision points for proposed regulation 18361.10.

#### **A. Subdivision (a) – Scope Of Regulation And Decision Point 1**

##### **"§ 18361.10. Administratively Adjudicated Enforcement Decisions As Precedent."**

"(a) This regulation applies to administratively adjudicated enforcement decisions under the provisions of Government Code section 11425.60. The Commission may designate as a precedent decision part or all of a decision that contains a significant legal or policy determination of general application that is likely to recur. The Commission may also overrule its prior precedent designations. Such a designation or overruling thereof may be made upon the Commission's own motion, or at the request of {**Decision Point 1**} [a party/ any person]."

#### **1. Scope Of Regulation**

The first sentence explicitly limits the scope of the proposed regulation to "administratively adjudicated enforcement decisions" so as to preclude requests that, e.g., stipulated settlements be deemed precedent. The limitation to administratively adjudicated decisions is inherent in the APA and necessarily excludes the use of stipulations as bases for precedent. (See section 11410.10.)

The second sentence explicitly sets out the mandatory standard an agency must satisfy before it designates precedent – i.e., that the decision under scrutiny “contains a significant legal or policy determination of general application that is likely to recur.” Though the first sentence of the regulation refers to the statute (§ 11425.60), which states the mandatory standard for the designation of precedent, staff thought it would be more convenient for the reader to have the standard stated in the regulation itself, thus eliminating the need for the reader to refer to statutes outside the Act. Staff also added language indicating the Commission has implicit power to overrule its own precedent.

## **2. Decision Point 1 – Input From “Any Person,” Or Just The Parties?**

This decision point poses the possibility of limiting input, regarding the decision to designate or retract precedent, to the parties to the adjudicated decision under scrutiny as opposed to inviting input from the general public. Staff agrees that input from at least the parties (and/or their counsel) to the action being considered for designation as precedent would be useful to the Commission in its decision-making process under the proposed regulation. However, there is debate among staff as to whether input from persons other than those associated with the parties, i.e., the general public, is desirable, if not required, by law.

Though nothing in section 11425.60 mandates that the Commission accept input from the public (or even the parties) before designating precedent, the Commission’s actions are subject to the Bagley-Keene Open Meeting Act (§§ 11120 – 11132). Bagley-Keene applies to all state boards and commissions and generally requires those bodies to publicly notice their meetings, prepare agendas, accept public testimony and conduct their meetings in public unless specifically authorized by the Act to meet in closed session. (*Ibid.*) Bagley-Keene generally requires that a “state body shall provide an opportunity for members of the public to directly address the state body on each agenda item before or during the state body’s discussion or consideration of the item.” (Section 11125.7.)

One exception to the general “open meeting” rule refers to the “deliberations” of a state body on decisions to be reached in a formal adjudicative hearing required to be conducted pursuant to Chapter 5 of the APA or similar provisions of law. (Section 11126(c)(3); see §§ 11500 et seq. [Chapter 5 of the APA]; see also 11125.7(e).) This does not mean that all portions of a formal adjudicative hearing may be held in closed session.<sup>6</sup> Therefore, a particular decision by the Commission may only be discussed in closed session, and without input from the public, if it: (1) is to be reached as part of a formal adjudicative hearing required to be conducted pursuant to Chapter 5 of the APA,

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<sup>6</sup> The court has stated that “although state administrative agencies subject to the Administrative Procedure Act are required to conduct their ‘adjudicative proceedings’ openly (Gov. Code, § 11120, 11425.10, subd. (a)(3), 11425.20, 54950), the agency may conduct its deliberations in private (*id.*, § 11126, subd. (c)(3); and see Cal. Law. Revision Com. com., 32C West’s Ann. Gov. Code, § 11425.20 (1998 pocket supp.) p. 94).” (*The Recorder v. Comm. On Judicial Performance* (1999) 72 Cal.App.4<sup>th</sup> 258, 281 fn. 22.)

and (2) is considered to be part of the “deliberation” portion of the adjudicative hearing process.

The first requirement is met since section 83116 of the Act requires that such hearings be conducted pursuant to Chapter 5 of the APA.<sup>7</sup> Determining whether the second requirement is met is more difficult since staff has uncovered no direct authority stating whether a state agency’s decision – about whether an adjudicated decision should be deemed precedent under section 11425.60 – is considered part of the “deliberation” exception to the open meeting presumption mandated by Bagley-Keene. In the following quote, the court describes, in general terms, what part of an adjudicative hearing a state agency may conduct in closed session under Bagley-Keene:

“When the hearing has reached the *decisional stage*, it may recess the hearing and hold an executive session for the sole purpose of deliberating on the decision to be reached on the subject matter of such hearing. At the conclusion of such executive session, the Board must reconvene the public hearing and make public announcement of its decision. [¶] Such a construction . . . preserves inviolate the right of the public to participate fully and completely in open discussions of all matters involving Board action and openly to air its views as to the vices and virtues of such action. It is an assurance that no public business will be conducted at closed or unannounced hearings. At the same time, the Board is given an opportunity to review the evidence before it, to exchange views and to deliberate thereon under conditions conducive to calm, orderly and frank discussion. In a broad sense, such a procedure is similar to a trial by jury – the evidence and verdict are presented in public, but the deliberations are conducted at a closed session.”

(*California State Employees’ Assoc. v. State Personnel Brd.* (1973) 31 Cal.App.3d 1009, 1013, emphasis in original.)

One argument is that the Commission’s discussion regarding whether a decision should be deemed precedent constitutes “deliberation.” The primary basis for supporting that argument is that discussion of whether to designate precedent would necessarily involve a review of the evidence, just as a jury does during the decisional stage of its proceedings, and, therefore, such a discussion comes within the “deliberation” exception to Bagley-Keene. This argument is also bolstered by the fact that the Legislature explicitly considers decisions about the designation of precedent to not be rulemaking. (Section 11425.60(b).) This seems to indicate that the Legislature does not consider precedent designation as an exercise of an agency’s quasi-legislative powers. The Legislature’s statement also appears to hint that it did not want to encumber this particular arena of decision-making by state agencies with public input. Finally, to staff’s knowledge, no other state agency which currently generates and maintains its own body

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<sup>7</sup> Though the section authorizing the designation of precedent (§ 11425.60) is contained in Chapter 4.5 of the APA and not Chapter 5, it still meets the first requirement since Chapter 4.5 explicitly applies to adjudicative proceedings conducted under Chapter 5. (See section 11501(c).)

of case law, invites public comment on decisions regarding precedent designation. These arguments are supported by the Enforcement Division.

The opposing argument states that because a decision as to whether a case should be deemed precedent has only prospective effect, and has no effect on the actual parties to the case being considered, such a decision does *not* constitute adjudicative deliberation. This argument asserts that decisions about how certain laws or regulations will be applied in future cases only occurs once a decision is made regarding the parties before it; precedent designation is only relevant to *future* parties in future cases. Therefore, precedent designation is more in the arena of policy determination and, therefore, should be conducted in open session.<sup>8</sup> This point is also bolstered by the fact that the Legislature explicitly stated that an agency's designation, or failure to designate, precedent is not subject to judicial review. (Section 111425.60(b).) In addition, without more explicit authority, the over-arching directive is that state agencies conduct their meetings in the open. Finally, it should be noted that in California's state appellate courts, inquiry is accepted by non-parties on whether decisions should be published or not. (See Cal. Rules of Court, rules 976 – 979 [Rules for Publication of Appellate Opinions].)

Because there is no authority directly on point either way, the Legal Division Staff believes that prudence and good policy would best be served by conducting discussions about precedent designation openly and with input from both parties and the general public. Therefore, Legal Division Staff believes that the words "any person" should be used in subdivision (a).

## **B. Subdivision (b) – The Indexing Of Precedent**

"(b) The Commission shall maintain an index of significant legal and policy determinations contained in precedent decisions.

"(1) The index shall be updated at least annually, unless no new precedent decisions were designated or overruled that year.

"(2) The index shall be made available to the public by subscription and on its website.

"(3) The availability of the index shall be publicized annually in the California Regulatory Notice Register."

This subdivision consists of language that is largely contained in section 111425.60 and, therefore, is mandatory. We have added the suggested language "and on its website."

Note that the index to be maintained is not necessarily of the entire text of the decisions issued by the Commission. Instead, the requirement is that the index reflect only, or at least, "significant legal and policy determinations contained in precedent

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<sup>8</sup> In cases where judicial review of agency actions is permissible, the Commission's interpretations of statutes and regulations are given more deference by the courts if they are reached after public notice and comment. (*Brown v. FPPC* (2000) 84 Cal.App.4<sup>th</sup> 137, 150.)

decisions.” The benefit of the index is that it permits the Commission, or the staff as instructed by the Commission, to summarize the significant legal and policy determinations contained in a particular decision. For example, if the Commission chose to make only one part of a decision precedential, it would be so specified in the index. On the other hand, an entire decision could contain several significant legal and/or policy determinations that would be separately summarized for public reference.

### **C. Subdivision (c) – Permissive Factors To Consider**

“(c) In determining whether all or part of a decision should be designated or overruled as a precedent decision, the Commission may consider whether the decision:

- “(1) Addresses a legal or factual issue of general public interest;
- “(2) Resolves a conflict in the law;
- “(3) Provides an overview of existing law or policy;
- “(4) Clarifies existing law or policy;
- “(5) Establishes a new rule of law or policy; or
- “(6) Would be more appropriately addressed by regulatory amendment, the advice process, or the opinion process.”

This subdivision sets out a list of suggested factors for the Commission to consider in deciding whether to designate or overrule precedent. These factors are not made mandatory by section 11425.60. Such a list of factors and/or procedural guidelines could aid the Commission in deciding which, if any, of their adjudicated decisions should be deemed precedent in order to aid future ALJ’s (and judges) in interpreting and implementing the statutes and regulations comprising the Act. (See Cal. Rules of Court, rule 976(b) [factors state appellate courts use to determine whether an opinion should be published].) The last factor is an expanded expression of language contained in the Law Revision Commission’s 1995 comments, indicating that agencies should endeavor to issue policy and express interpretation through the rulemaking process if possible.

### **D. Subdivisions (d) & (e) – Decision Point 2 “Process”**

These subdivisions set out a suggested order or process through which input from parties or all persons may argue for or against the designation of precedent. The Enforcement Division is opposed to spelling out any such procedures in the regulation itself, believing that public input is not required, and that such a formalized process would discourage use of the proposed regulation and thus, diminish its utility.

If the Commission is inclined to use the words “any person,” Legal Division staff would recommend that some version of the detailed procedures be included. The Enforcement Division is against the inclusion of such specific process for fear that it would encumber the designation of precedent by the Commission.

“**{Decision Point 2}** [(d) The Commission may decide whether to designate or overrule as precedent all or part of a decision at any Commission meeting held after a decision becomes final **{Decision Point 2a}**], except as provided for in subdivision (e)]. For purposes of this regulation, a decision becomes “final” at the time a petition for reconsideration has been exhausted pursuant to 2 Cal. Code Regs. section 18361.9(c).

“(e) **{Decision Point 1}** [A party/ Any person] may submit a request that a decision be deemed precedent, or that a prior designation as precedent be overruled, pursuant to the following procedures:

“(1) The request shall be in the form of a concise written brief stating **{Decision Point 1}** [the person’s interest and] the reasons why all or part of a decision should be designated precedent, or why such prior designation should be overruled.

“(2) Where the Commission has not acted to either designate or overrule all or part of a decision within 30 days of its becoming final, the request shall be delivered to the Executive Director of the Commission no later than 60 days after the decision becomes final. However, where the Commission has designated or overruled all or part of a decision as precedent, the request shall be delivered to the Executive Director within 30 days of such action. The Executive Director will then deliver all requests timely made to the Commissioners, the Chief of the Enforcement Division, and all reasonably available parties to the decision. Within 60 days of delivery of the requests to the Commission, it may decide which part or parts, if any, of the final decision will be designated as precedent or overruled.]]”

The Enforcement Division envisions an unwritten process as follows. The Commission would only be obliged to consider argument from the parties (not the general public) regarding precedent designation. Such argument would be submitted as simply another part of the parties’ briefs to the Commission supporting adoption, modification or rejection of a proposed ALJ decision. In other words, Enforcement contemplates that the Commission would deliberate on how to rule with regard to the specific parties involved in a case, at the same time that it was considering arguments for and against making its decision precedential.

Enforcement is also amenable to a process where the Commission would first deliberate on the specific case in closed session, then come out of closed session and openly debate whether it should be deemed precedent. Either way, Enforcement is against having such process written into the regulation, and wants argument regarding the substance of the specific case and precedent designation to occur at a single Commission meeting.

The Legal Division, on the other hand, believes that because public input should be allowed on precedent designation, the process of considering the case at issue and

whether it will be deemed precedent, must be done in two steps. Subdivisions (d) & (e) describes one possible version of a bifurcated process. It is believed that if public input is going to be allowed on whether decisions should be deemed precedent, the public should not be able to comment until after the Commission has decided the specific case, with regard to the specific parties and evidence, before it. If not, entertaining public comment would, at best, violate principles of standing and raise the specter of bias in every administrative ruling. At worst, a non-bifurcated approach could undermine the adjudicative decisions of the Commission as violations of due process. The Legal Division therefore believes that it is better to have the process laid out explicitly in the regulation than developed internally.

Subdivision (e) is reflective of the suggested process as developed and endorsed by the Legal Division. The first step could be initiated either by the Commission or (if the Commission did not make a designation within 30 days of a decision becoming final) a party or member of the public. The second step would occur after the parties (and potentially members of the public as well) had an opportunity to submit their arguments. Such a process would, as described in our discussion under subdivision (a), eliminate: (1) the chance that the public would influence the Commissioners before they made a decision on the merits of the particular case, (2) preclude the possibility that the Commission's decision regarding precedent could be attacked later as one made in violation of Bagley-Keene, and (3) encourage the presentation of a range of views broader than those that might be raised by just the parties to the underlying action.

Finally, staff contemplates that this regulation would only be used to designate adjudicated decisions as precedent which will be decided *after* the effective date of the regulation. Though section 11425.60 permits agencies to designate as precedent decisions issued in the past, staff recommends against this. The concern is that without the argument from parties who have the facts of the case fresh in their minds, the designation of past cases may be of reduced utility to the Commission. In addition, because the Act is subject to frequent, and sometimes quite fundamental changes, the value of expending resources on "reaching back" for cases to designate as precedent has reduced value.

#### **E. Subdivision (f) – Other Protections**

(f) The designation or overruling of all or part of a decision as precedent is not rulemaking. The Commission's designation of all or part of a decision, or the lack of such designation, as precedent is not subject to judicial review.

This language is taken from section 11425.60 and is reiterated here for the convenience of the reader.

#### **IV. SUMMARY AND RECOMMENDATIONS**

Arguably, by creating a body of precedent decisions, the Commission would be able to clarify areas of the Act rarely reached (or which are too awkward to explicate) through the issuance of regulations or opinions. In addition, arming all parties to administrative adjudications with precedent would likely facilitate settlement prior to hearings. On the other hand, exercising its right to develop a body of precedent would also consume more of the agency's resources by, e.g., increasing the level of scrutiny the Commissioners would have to focus upon the wording of decisions to be deemed precedent. The Commission would also want to take care that its pronouncements of policy and interpretation through the designation of precedent did not conflict with such other pronouncements reflected in its regulations and opinions.

The Commission staff proposes the Commission notice this regulation for adoption at its January 2006 meeting.